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Supreme Court of the United States

OCTOBER TERM, 1966

CENTRAL OF GEORGIA RAILWAY COMPANY, ET AL.,
Petitioners,

v.

OSCAR L. ALTMAN, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Central of Georgia Railway Company and two of its directors, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in its case No. 19824.

OPINIONS BELOW

The opinion of the Court of Appeals and the dissent, as yet unreported, appear at Appendix A, p. 1a, *infra*. The opinion of the United States District Court for the District of Columbia (Judge Spottswood W. Robinson, III) is reported at 254 F. Supp. 167 (1965) and appears at Appendix B, p. 6a, *infra*.

JURISDICTION

The judgment of the Court of Appeals in its case No. 19824 was entered on May 19, 1966. Appendix A, p. 1a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

Whether the Court of Appeals may deny the inherent power of the United States District Court for the District of Columbia to resist imposition upon its jurisdiction of a stockholders' action to compel a Georgia corporation to pay past and future dividends where it appears that the District Court dismissed the action on the grounds of *forum non conveniens* after extensive consideration of all the factors relevant to the exercise of its discretion and no abuse of its discretion was found on appeal?

II

Whether the District Court for the District of Columbia has jurisdiction over a stockholders' action alleging that the directors of a Georgia corporation have abused their discretion and seeking a court order for payment of past and future dividends where it appears that not even a quorum of the directors whose affirmative action is required by law with respect to all dividend determinations can be served in the District of Columbia but that a majority of the directors are available in Georgia, where the corporation has its principal place of business?

STATUTES AND REGULATIONS INVOLVED

None.

STATEMENT

Two stockholders filed this class action in the United States District Court for the District of Columbia, naming as defendants Central of Georgia Railway Company (Central), a Georgia corporation operating a railroad in Georgia, Alabama and Tennessee, and eighteen of its directors. Jurisdiction of the District Court was based on Title 11, Section 521 of the District of Columbia Code.

The Complaint alleges that the directors of Central acted "arbitrarily, and in an abuse of their discretion" (JA 5)[1] in failing to declare and pay dividends on the company's preferred stock from 1960 through 1963 and seeks a court order directing Central's past and future dividend action. (JA 11). The Complaint, as framed against the named defendants, could not have been filed in any other federal court since complete diversity could not be shown and the cause of action is not itself based on any federal question.

Central and only two of its directors were found and served in the District of Columbia.[2] These defendants, petitioners here, moved the United States District Court for the District of Columbia to dismiss

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[1] "JA" references are to the pages of the Joint Appendix printed for use in the Court of Appeals. Nine copies of the Joint Appendix have been filed with the Clerk of this Court pursuant to Rule 21(4) of the Supreme Court Rules.

[2] Separate but identical motions to dismiss were filed by Central and one of the directors, Mr. D. W. Brosnan. After the decision in the District Court, another directer, Mr. Franklin, was served. Mr. Franklin then filed an identical motion to dismiss and the parties have stipulated that his motion will be governed by the resolution of the two motions considered below. Mr. Franklin has since resigned as a director of Central, as of January 1, 1966.

the Complaint on jurisdictional and *forum non conveniens* grounds. The District Court accepted jurisdiction in spite of the absence of a quorum of the directors but dismissed on grounds of *forum non conveniens*. The Court of Appeals, without making any determination that the District Court had abused its discretion, took the view that the action should remain in the District of Columbia, affirming the District Judge on the jurisdictional point without comment.

The Motion to Dismiss was heard in the District Court on briefs and affidavits of the parties and was granted after extended oral argument lasting over two hours. Respondents conceded that the issue which would be presented at the trial as to the alleged abuse of discretion by Central's directors would relate "to what deliberations, if any, were taken by Central's Board of Directors in failing to declare preferred dividends and whether these decisions were arbitrary. Relief would essentially be the ordering of paying of dividends due, with protective measures to be sure that the decree was not flouted." (JA 101).

The proofs showed that Central was incorporated in 1895 under the Railroad Laws of Georgia and that its headquarters are located at Savannah, Georgia (JA 17, 21). Central operates railroad mainline mileage in Georgia, Alabama and Tennessee, of which 1,253 miles (71.8%) are located in Georgia (JA 18). Central does not operate and never has operated any railroad lines or facilities within the District of Columbia, has no trackage right over any other railroad in the District of Columbia and does not provide any freight or passenger service to or from the District of Columbia (JA 18).

Central has no bank account or other assets in the District of Columbia and pays no taxes there. (JA 18). It maintains an office in the District of Columbia for the solicitation of freight, principally from the Government, for movement over Central's system in Georgia, Alabama and Tennessee (JA 18). Central maintains its accounting records at Atlanta, where its computers are located (JA 19), and the minutes of the relevant meetings of its stockholders, Board of Directors, and Executive Committee are all maintained in Savannah (JA 18).

Central has eight employees in the District of Columbia, including several officers. The majority of its officers, including many officers specifically concerned with the issues in the case, and 1,502 employees are based in Georgia. (JA 18-19). The principal financial officer of Central and its President, both of whom are regularly consulted by the board on dividend matters, reside in Georgia, as do the principal officers of the company concerned with maintenance, operations, and similar factors affecting dividend policy (JA 19).

The proofs showed that the preferred stock of Central was held by 151 stockholders who reside in thirty different states and one foreign country (JA 19).[3] Nine of the shareholders, including both of the two respondents, show addresses in the District of Columbia (JA 19, 2).

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[3] The proofs showed that Southern Railway Company owned approximately 93% of the preferred and 96% of the common stock of Central. Since the District Court rendered its decision, however, additional Central shares have been tendered to Southern, so that as of May 15, 1966, Southern owned 98.51% of Central preferred and 99.33% of Central common.

A Georgia railroad is required by statute to have a majority of its directors resident in that state (JA 20). Central has twenty directors, of whom fifteen reside in the State of Georgia (JA 20). Three of the directors are officers of Central, two are officers of Southern Railway Company, the principal shareholder, and the remaining members of the board are Central's General Counsel and various prominent independent businessmen (JA 24-26). Central's Board of Directors, which must pass on all dividend actions of the railway, usually meets in Georgia and has never met in the District of Columbia (JA 21). Under Central's By-laws, six directors constitute a quorum and accordingly the affirmative vote of a minimum of four directors is required for any action taken (JA 20).

Respondents acknowledged in the Complaint that during the years in question Central has incurred substantial expenditures for maintenance and massive repair and reconstruction of Central's lines, purchased in excess of $12,000,000 of boxcars, railway engines and other rolling stock, and undertaken projects for the repair and construction of yards and other facilities (JA 10, 11). The District Court recognized petitioners' contention that these expenditures and related anticipated and realized expenses obviously bearing on discretionary dividend actions would have to be reviewed at the trial in the course of an examination of Central's internal affairs through the testimony of directors, officers, and employees located in Georgia and also through records located in that state (App. B, p. 17a).[4]

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[4] "App. B." references are to pages of the District Court's opinion printed in Appendix B of this brief.

On September 29, 1965, the District Court filed a detailed opinion containing findings of fact and a discussion of the pertinent authorities in which the Court set forth the grounds on which in its discretion it had determined to grant the motion to dismiss under the doctrine of *forum non conveniens*. Among the factors governing the District Court's exercise of its discretion were the following:

(1) that the traditional presumption in favor of the plaintiffs' choice of forum is, under this Court's decision in *Koster* v. *Lumbermens Mutual Co.*, 330 U.S. 518, 524 (1947), "considerably weakened" in a stockholders' action such as the case at bar (App. B., p. 15a);

(2) that Central "is a Georgia corporation in the fullest sense of the word" and that "plaintiffs' action, by its very nature, will compel detailed inquiry into various aspects of Central's internal affairs" (App. B., pp. 15a, 17a);

(3) that the great majority of the witnesses whose testimony would necessarily have to be heard at trial reside in Georgia, beyond the reach of process from the District Court (App. B., p. 17a);

(4) that "the records and documents that trial of the issues would inevitably necessitate are concentrated overwhelmingly there [in Georgia]" (App. B., p. 18a);

(5) that Central's board meetings are traditionally held in Georgia, that its operations are centered there, and that "all important events in the litigation occurred outside of the District [of Columbia]" (App. B., pp. 16a, 18a);

(6) that the trial of this action will be governed by Georgia law (App. B., pp. 18a-19a);

(7) that "the exigencies of this Court's docket and its responsibilities to the Washington community necessitate that access be denied where local concern in the litigated matter is at best very remote." (App. B., p. 20a);

(8) that "objective evaluation of all factors related to the interests and conveniences of the parties and witnesses, the litigation itself and orderly administration of the law, leads inevitably to the conclusion that the action must be discontinued here." (App. B., p. 21a).

Respondents appealed, asserting that the District Court had abused its discretion and on May 19, 1966, the Court of Appeals reversed. In expressing the view that the action should remain in the District of Columbia, the Court of Appeals made no determination that the District Court had abused its discretion in any way, nor did it state that any of the findings of the District Court were erroneous.

Although petitioners also strenuously urged on brief and at oral argument that dismissal was required by reason of the fact that the District Court was without jurisdiction to entertain the action, the Court of Appeals made no reference to this aspect of the case.

On motion by petitioners, the Court of Appeals stayed the issuance of its mandate pending the outcome of this petition.

REASONS FOR GRANTING THE WRIT

I. Forum Non Conveniens

The District Court properly exercised its discretion and dismissed on grounds of *forum non conveniens.* Though no abuse of that discretion was found by the Court of Appeals, it nevertheless reversed. This ac-

tion by the Court of Appeals challenges not only the scope but the very existence of the District Court's discretion to "resist imposition upon its jurisdiction"[5] by dismissing an action without prejudice on the grounds of *forum non conveniens*. It thus flouts decisions of this Court which recognize the exercise of discretion by the District Court with respect to such matters to be fundamental to "the autonomous administration of the federal courts in the discharge of their own judicial duties."[6]

It need hardly be emphasized here that the broad discretion traditionally afforded the District Courts with respect to various questions of judicial procedure is an essential element of the federal judicial system. The importance of protecting and preserving the right of judges at the trial level effectively to exercise their discretion with respect to those procedural questions which they have been recognized as best qualified to decide has been repeatedly stressed by this Court:

> "Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts. . . .
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> ". . . . If in a rare instance a district judge abuses the discretionary authority the want of which

[5] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

[6] Koster v. Lumbermens Mutual Co., 330 U.S. 518, 520, n. 1 (1947). See also Sullivan v. Behimer, 363 U.S. 335, 351 (1960).

> precludes an effective, independent judiciary, there is always the opportunity for corrective review by a Court of Appeals and ultimately by this Court." *Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U.S. 180, 183-185 (1952).

The issue of *forum non conveniens* is a procedural question which has traditionally and explicitly been left to the sound discretion of the District Court, and the District Court's decision in this regard may not be overturned unless it has clearly abused its discretion. This principle, first expressly adopted in *Rogers* v. *Guaranty Trust Co.*, 288 U.S. 123, 130-131 (1933), was last defined and clarified by this Court in the companion cases of *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947) and *Koster* v. *Lumbermens Mutual Co.*, 330 U.S. 518 (1947). The Court of Appeals proceeded in total disregard of the teaching of these and similar cases.

In *Gulf Oil*, as in the case at bar, the questions presented were, in the Court's words, "whether the United States District Court has inherent power to dismiss a suit pursuant to the doctrine of *forum non conveniens* and, if so, whether that power was abused in this case." 330 U.S. at 502. In upholding the power of the District Court and overruling the Court of Appeals' finding that the District Court had abused its discretion, this Court said:

> "Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses." *Id.* at 508.

It was made absolutely clear, moreover, that it is the discretion of the District Court, not that of the Court of Appeals, which, unless abused, is to govern the application of the doctrine:

> "We are convinced that the District Court did not exceed its powers or the bounds of its discretion in dismissing plaintiff's complaint and remitting him to the courts of his own community. The Circuit Court of Appeals took too restrictive a view of the doctrine as approved by this Court." *Id.* at 512.

Similarly, in *Koster*, a case strikingly similar to the case at bar, the Court concluded:

> "This Court cannot say that the District Court abused its discretion in giving weight to the undenied sworn statements of fact in defendant's motion papers, especially in view of the failure of plaintiff's answering affidavit to advance any reason of convenience to the plaintiff." 330 U.S. at 531.

The discretion to apply the doctrine of *forum non conveniens* in order to "resist imposition" on their jurisdictions has thus been explicitly vested in the judges of the various District Courts, "the judges who are, to use a familiar but appropriate phrase, on the firing line, who are in much more intimate, continuous touch with the needs for the effective functioning of the federal judicial system at the trial level."[7]

In this case, Judge Robinson, after studying the affidavits filed by the defendants and the legal memoranda submitted by both sides, heard oral argument on the issues presented for over two hours. (JA 27-98).

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[7] Sullivan v. Behimer, 363 U.S. 335, 355 (1960).

In support of his subsequent decision to dismiss the action without prejudice on the ground of *forum non conveniens,* he filed a sixteen-page opinion (App. B., p. 7a), nine pages of which were devoted exclusively to a careful consideration of the factors recognized by this Court as relevant to the discretionary application of *forum non conveniens*, all of which led, in his judgment, "inevitably to the conclusion that the action must be discontinued here." (App. B., p. 21a).

Yet the Court of Appeals, in a two-to-one decision, has now seen fit to overrule the judgment of the District Court while at the same time refusing to find that it abused its discretion. Indeed, the dissenting opinion of Circuit Judge Danaher found that Judge Robinson not only did not abuse his discretion, but that in fact "he has *correctly* exercised his discretion." (Appendix A., p. 5a, *infra*). (Emphasis added).

The Court of Appeals' blatant substitution of its own view for that of the District Court is emphasized by the cavalier way in which the majority simply ignored the numerous considerations which led the District Court to exercise its discretion in favor of dismissal. The following outline of the various factors held by this Court in *Gulf Oil* and *Koster* to be relevant to the appropriateness of dismissal on the ground of *forum non conveniens* summarizes the consideration given each factor by the District Court.

1. The Presumption in Favor of the Plaintiff's Choice of Forum

The District Court recognized the traditional presumption in favor of the plaintiff's choice of forum but relied on this Court's holding in *Koster* that in an action such as a stockholder derivative suit, "where there are hundreds of potential plaintiffs, all equally

entitled voluntarily to invest themselves with the corporation's cause of action and all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened." 330 U.S. at 524.

2. The Internal Affairs of a Foreign Corporation

The District Court found:

(1) that Central "is a Georgia corporation in the fullest sense of the word" (App. B., p. 15a), that its principal place of business is there, its operations are centered there, and almost all of its property is located there, that regular meetings of its stockholders have traditionally been held in Georgia, that its corporate records are kept in Georgia, that the vast majority of its directors and employees are Georgia residents, and that "the extent of its contacts in the District is the solicitation of freight, principally from the government, for movement over its system in Georgia, Alabama and Tennessee" (App. B., pp. 15a-16a);

(2) that "plaintiffs' action, by its very nature, will compel detailed inquiry into various aspects of Central's internal affairs" (App. B., p. 17a);

(3) that, as this Court held in *Koster,* "although the fact that Central's internal affairs must be deeply probed is not alone sufficient to warrant dismissal of the action, it is a circumstance to be given weight in the determination" (App. B., pp. 18a-19a).

3. The Location of Witnesses

The District Court found that "the bulk of the witnesses whose testimony must necessarily be heard are outside the District of Columbia" (App. B., p. 17a);

that fifteen of its twenty-one directors reside in Georgia whereas only one is a resident of the District of Columbia (App. B., p. 16a); that 1,494 of its employees reside in Georgia and only eight in the District of Columbia (App. B., p. 16a); that its President and Executive Vice President, "who during the period in question regularly consulted the board of directors on dividend matters," are stationed in Georgia, as are its principal officers concerned with day-to-day operations and maintenance (App. B., p. 16a); that "the plaintiffs have not identified any witness within the District, and aside from the plaintiffs themselves, and the one director and possibly the handful of employees here, no prospect of any other is seen." (App. B., pp. 17a-18a).

4. The Accessibility of Sources of Proof

The District Court found that "the records and documents that trial of the issues would inevitably necessitate are concentrated overwhelmingly there [in Georgia]" and that "the plaintiffs have pointed to no documentary evidence within the District that would be needed in or would be relevant to this action." (App. B., p. 18a).

5. The Location of the Activities Which Occasioned the Suit

The District Court found that the meetings of Central's Board of Directors at which dividend policy was decided were traditionally held in Georgia and had never been held in the District of Columbia; that Central's operations are centered in Georgia; that almost all of its property is located there, whereas none is found in the District of Columbia; and that "all important events in this litigation occurred outside of the District [of Columbia]." (App. B., pp. 15a, 16a, 18a).

6. The Application of Law Foreign to the Forum

The District Court found that this action would be governed by Georgia law and that, while the difficulty of applying foreign law would not of itself justify referring the case to Georgia, this is another factor which, according to this Court's decisions in *Gulf Oil* and *Koster,* should be "carefully considered." (App. B., pp. 18a-19a).

7. The Public Interest in Avoiding Litigation in a Community Unrelated to It

The District Court, relying on this Court's ruling in *Gulf Oil,* that "administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin" (330 U.S. at 508), found that the exigencies of its own docket[8] and its responsibilities to the Washington community weighed heavily in favor of dismissal (App. B., p. 20a), that Central performed an important public service, especially to the citizens of Georgia, and since the Complaint involves charges against "those to whom the management and destiny of the corporation have by Georgia law been confided" and to whom as a class "Georgia displays special concern by her requirement that a majority of their group be residents of that state," that "an undertaking, without adequate justification, to resolve the questions the complaint poses in this forum . . . is fraught with all the

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[8] According to the 1965 Annual Report of the Director of the Administrative Office of the United States Courts, 5,197 civil cases were commenced in the District Court for the District of Columbia in 1965. By contrast, only 1,432 civil cases were filed in all the District Courts in Georgia combined, and any action filed in one of the Superior Courts of Georgia could be promptly tried as soon as the case was at issue. (JA 21).

sensitivities and dangers usually associated with unwarranted intrusions." (App. B., pp. 20a-21a).

8. The Overriding Tests of Convenience to the Participants and the Interest of Justice

The District Court, relying upon this Court's holding in *Koster* that "the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice" (330 U.S. at 527), found that "the courts in Georgia[9] have far more to offer" (App. B., p. 21a) and that "objective evaluation of all factors related to the interests and conveniences of the parties and witnesses, the litigation itself and orderly administration of the law, leads inevitably to the conclusion that the action must be discontinued here." (App. B., p. 21a).

These determinations fully support the District Court's exercise of its discretion. This Court's review is needed to resist the effort of the Court of Appeals to override without cause the traditional domain of the District Courts. Review is also needed for the narrower purpose of reaffirming the principles announced in *Gulf Oil* and *Koster* with respect to the factors governing the doctrine of *forum non conveniens*. That doctrine is still of vital importance in the District of Columbia, since it is often the only vehicle by which the District Court here can resist imposition upon its jurisdiction.

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[9] This case could be brought in any of the Superior Courts of the State of Georgia and, if defendant Brosnan were not named, diversity of citizenship would exist, giving respondents the right to sue in the Federal District Courts of Georgia. Mr. Brosnan is committed to appear at either a state or federal court proceeding there. (JA 21).

The District Court for the District of Columbia has a unique dual function, sitting as both a federal court and a local court for the District of Columbia. Its jurisdiction, unlike that of all other District Courts, is not limited by the traditional federal jurisdictional requirements such as diversity of citizenship or the presentation of a "federal question." Thus a high percentage[10] of the cases brought in the District Court for the District of Columbia are cases which, quite apart from considerations of venue and service of process, could not have been brought in any other Federal District Court for lack of federal jurisdiction and therefore, under the holding of *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), may not be transferred to another District Court under 28 U.S.C. 1404(a).[11] Indeed, this is precisely the reason, as the District Court took

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[10] The Administrative Office of the United States Courts informed counsel for petitioners that of the 5,197 civil cases commenced in 1965 in the District Court for the District of Columbia, 3,922, or 75.5%, were cases of local jurisdiction which therefore could not have been brought in any other Federal District Court. It is evident, moreover, that the unique position of the District Court for the District of Columbia in this regard weighed heavily in the mind of Judge Robinson, who pointed out in the case at bar that:

> "The courts of the District of Columbia are, of course, open to all litigants who have good reason to utilize them. But the exigencies of this Court's docket and its responsibilities to the Washington community necessitate that access be denied where local concern in the litigated matter is at best very remote." (App. B., p. 20a).

[11] 28 U.S.C. 1404(a) provides:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

pains to point out (App. B., pp. 22a-23a), that its decision in the case at bar took the form of dismissal without prejudice under the doctrine of *forum non conveniens* rather than transfer under Section 1404(a). At stake in the case at bar therefore is the continued viability of a doctrine which, because transfer from the District Court for the District of Columbia under Section 1404(a) will often be impossible, is still the only means by which that Court is able to resist imposition upon its already overcrowded calendar of numerous cases in which "local concern in the litigated matter is at best very remote." (App. B., p. 20a).[12]

The initial questions presented by this petition are thus of far-reaching significance to the effective administration of justice in the Federal District Courts, and especially in the District Court for the District of Columbia. The comment of Justice Clark, dissenting on other grounds in *Norwood* v. *Kirkpatrick,* 349 U.S. 29, 42 (1955), in which this Court was called upon to clarify the scope of the trial judge's discretion to transfer an action under Section 1404(a), is equally applicable to the case at bar:

> "The question is one of considerable importance in the administration of the lower federal courts, and, considering the inadequacy of appeal, should be settled in this case if it is to be settled at all in the near future."

In addition to ignoring the principles carefully developed by this Court to assure effective administration of justice at the trial level, the decision of the Court

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[12] See, *e.g.*, Gross v. Owen, 95 U.S. App. D.C. 222, 221 F.2d 94, 96 (1955); Simons v. Simons, 88 U.S. App. D.C. 180, 187 F.2d 364, 365 (1951), *cert. denied,* 341 U.S. 951 (1951).

of Appeals below places the directors of Central of Georgia Railway Company at a serious and unnecessary disadvantage. They are being forced to defend their business judgment in a forum where they do not live, where none of the events in issue occurred, away from their principal offices where the relevant books and records are maintained, in a jurisdiction which has no general knowledge of Georgia law and remote from the site of the practical operating problems which necessarily govern discretionary dividend action.

The State of Georgia requires that a majority of the directors of a Georgia railroad be Georgia residents, thus assuring that a quorum will always be subject to suit there.[13] Since the directors can therefore always be found and held accountable in Georgia, there is no justification for dragging them into the District of Columbia other than the fact that plaintiffs' lawyer, who is also one of the two plaintiffs, lives in the District of Columbia and apparently prefers to be near his office. The personal convenience of counsel has never been recognized, however, as a relevant factor under the doctrine of *forum non conveniens*. See *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508-509 (1947).

The mere presumption in favor of the plaintiffs' choice of forum, moreover, "considerably weakened" in a stockholders' action such as this, is of little

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[13] Code of Georgia Annotated, Title 94, Railroads § 94-203 (2581) provides:

> "*Meeting for organization; place; notice; quorum. Directors, officers and agents*— . . . No person shall be elected a director unless he be a stockholder owning stock in his own name, and a majority of the directors must be citizens and residents of this State . . . (Acts 1892, p. 40)."

significance when weighed against all the other factors which call for a trial of this action in Georgia. The overriding interest of fair and expeditious judicial administration, not the wishes of the plaintiffs, is the controlling consideration and must be reaffirmed.

II. Jurisdiction

The second question presented requires the clarification of this Court both because it is jurisdictional in nature and because its treatment by the Court of Appeals below presents a conflict with the decisions of several other Circuits.

The District Court held that it could retain jurisdiction over the plaintiffs' action even though it was conceded that not even a quorum of the directors who were alleged to have abused their discretion could be made parties to the action in the District of Columbia, that at least a quorum was needed to declare dividends, and that a quorum could be sued in an appropriate state or federal court in Georgia.[14] The Court of Appeals did not even pause to discuss the question

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[14] Apparently recognizing the weakness of their jurisdictional position in the District Court, respondents filed a belated motion to have the Southern Railway Company vouched into the Complaint on the theory that the District Court could then enforce its judgment against the directors of Central by using "leverage" over Southern, the controlling shareholder. (JA 100). Though unwilling to amend the Complaint to state a cause of action against Southern, respondents repeatedly suggested that Southern had somehow acted in an improper manner in influencing Central's directors (JA 62, 67, 68, 81). These unsupported allegations were rejected by the District Court (App. B., p. 11a), the motion was denied, and the District Court's decision in this regard was affirmed by the Court of Appeals.

but nevertheless affirmed without comment the District Court's holding on this issue.[15]

It is of course well settled that the inability of a District Court to obtain jurisdiction over indispensable parties deprives it of its jurisdiction to proceed. *Swan Land & Cattle Co.* v. *Frank*, 148 U.S. 603, 611 (1893); *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199, 235 (1902). The crucial question presented therefore is whether at least a quorum of Central's Directors are indispensable parties in this case.

It should be emphasized once again that this is *not* a case in which a quorum of the defendant corporation's directors is not amenable to suit in *any* forum. As is evident from a review of the Circuit Court decisions discussed below, the weight of authority is clear that a quorum of a company's directors cannot be held indispensable parties to an action when it appears that there is *no forum* in which a quorum of the directors could be sued. That is not the issue here.

It is equally clear, however, that the general rule heretofore recognized—either explicitly or implicitly—by the Courts of Appeals for several Circuits is that in a stockholders' action to compel the declaration of dividends in which, as in the case at bar, the corporation and a quorum of the directors alleged to have

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[15] Though petitioners did not cross-appeal from the District Court's decision since it emphasized the Court's lack of jurisdiction over a quorum of directors in support of its dismissal under *forum non conveniens*, the jurisdictional issue was vigorously argued in petitioners' brief on appeal and at oral argument. The jurisdictional question was thus properly before the Court of Appeals and should be reviewed here. United States v. American Ry. Exp. Co., 265 U.S. 425, 435-436 (1924); Langnes v. Green, 282 U.S. 531, 538 (1931); Helvering v. Lerner Stores Corp., 314 U.S. 463 (1941).

abused their discretion are subject to suit in at least one jurisdiction, a quorum of the directors are indispensable parties, and the action must be brought in a jurisdiction where they can be sued.

This rule was first recognized by the Sixth Circuit in *Schuckman* v. *Rubenstein,* 164 F.2d 952 (6th Cir. 1947), *cert. denied,* 333 U.S. 875 (1948). Relying on this Court's definition of indispensable parties as "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience,"[16] the Sixth Circuit found that at least a quorum of the directors were indispensable and dismissed for lack of jurisdiction.[17]

> "The court itself cannot declare a dividend; its power is limited to a judgment in personam against the members of the board. . . . Jurisdiction over only two of the nine directors in this case made it impossible for the court to render an effective decree. At least three other directors

[16] Minnesota v. Northern Securities Co., 184 U.S. 199, 236 (1902).

[17] See also Tower Hill Connellsville Coke Co. v. Piedmont Coal Co., 33 F.2d 703, 706 (4th Cir. 1929), where the Fourth Circuit said:

> ". . . It is apparent that, if the court below, by its final decree seeks to direct or in any way to control the management of the Tower Hill of Pennsylvania that company as well as its officers and directors would be necessary and indispensable parties. It follows that any effort on the part of the court below to direct the payment of any specific dividends by the Tower Hill of Pennsylvania would be an effort to control the management of that company, and could not be done without making its officers and directors parties."

were indispensable parties to the suit." (164 F.2d at 957).

The Sixth Circuit's decision in *Schuckman* was distinguished by the Third Circuit in *Kroese* v. *General Steel Castings Corp.*, 179 F.2d 760 (3d Cir. 1950), *cert. denied*, 339 U.S. 983 (1950). While holding that directors were not indispensable parties to a lawsuit by a defrauded shareholder to recover dividends on the facts of that case, the Third Circuit made it clear that the predominant consideration which led it to this conclusion was the fact that in *Kroese* there was *no* forum in which a quorum (which in that case was a majority) of the directors could be served.[18] Thus the Court emphasized that "there is no one state or federal district in which a majority of the board may be served" (179 F.2d at 762) and pointed out the inequity of holding a majority of directors indispensable "if that holding results in the complaining shareholder being unable to bring his suit either in any

[18] The *Kroese* decision was closely followed by the Fifth Circuit in Doherty v. Mutual Warehouse Co., 245 F.2d 609 (5th Cir. 1957), a case in which there was also *no* forum in which a quorum of the directors could be made parties. In *Doherty* the stockholder action had been brought in the United States District Court for the Middle District of Alabama against an Alabama corporation which apparently did virtually all of its business in Alabama and which had only three directors. Of these, one had been served with process and appeared. Another had been served but died before entering an appearance. The third was a resident of the District of Columbia and had neither been served nor entered an appearance. Accordingly, at the time the complaint was filed, two-thirds of the defendant corporation's directors were subject to the jurisdiction of the District Court, and, at the time of the Fifth Circuit's decision, one half of its directors were before the District Court. It was thus clear that there was no other forum in which a majority of the corporation's directors could be found and apparently no other forum in which the corporation could be sued.

federal court or, for that matter, in any state court. . ." (*Id.* at 763). In upholding the jurisdiction of the District Court, the Third Circuit concluded that "it would be most unjust if he [the plaintiff] could not prove that claim for the lack of a proper forum." (*Id.* at 766).

In the case at bar, however, respondents were not only free to bring their action in the courts of the State of Georgia; they have been implicitly directed to those courts by the public policy embodied in the requirement under Georgia law that a majority of the directors of all Georgia railroad companies be Georgia residents. Thus the holding of the Court of Appeals below that a quorum of Central's directors were not indispensable parties even though a majority of its directors could have been sued in Georgia is in direct conflict with the Sixth Circuit's holding in *Schuckman* as well as with the rationale of the Third and Fifth Circuits' decisions in *Kroese* and *Doherty*.

In addition, the holding of the Court of Appeals below, if allowed to stand, and the resulting decision on the merits in the District of Columbia would be subject to collateral attack in the courts of Georgia and could confront the directors with the dilemma of reconciling conflicting decisions as to their duty and/or right to declare corporate dividends. Such a result, it is submitted, is not only inconsistent with the holdings of *Schuckman, Kroese* and *Doherty,* but would certainly leave this controversy "in such a condition that its final determination may be wholly inconsistent with equity and good conscience." *Minnesota* v. *Northern Securities Co.,* 184 U.S. 199, 236 (1902).

CONCLUSION

For the reasons summarized above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19824

OSCAR L. ALTMAN, ET AL., *Appellants*

v.

CENTRAL OF GEORGIA RAILWAY CO., ET AL., *Appellees*

Appeal from the United States District Court for the District of Columbia

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Decided May 19, 1966

Mr. Victor A. Altman for appellants.

Mr. Gerhard A. Gesell, with whom *Mr. Bingham B. Leverich* was on the brief, for appellees.

Before BAZELON, *Chief Judge*, FAHY and DANAHER, *Circuit Judges*.

FAHY, *Circuit Judge:* On behalf of themselves and other preferred stockholders similarly situated appellants as plaintiffs sued the Central of Georgia Railway Company, a Georgia corporation, members of its Board of Directors, and several other of its officers. The purpose of the suit is to require Central to declare and pay dividends on its preferred stock for the years 1960, 1961, 1962, and 1963, and for related relief. Service was effected in this jurisdiction upon Central and one of its 21 directors. The parties served moved to dismiss on jurisdictional and *forum non conveniens* grounds. Appellants sought on motion to have the Southern Railway Company made an additional party defendant.

On the basis of the pleadings, affidavits, briefs and arguments of counsel, the District Court denied the motion of appellants to bring Southern in as an additional party, denied appellees' motion to dismiss insofar as it was grounded on lack of jurisdiction, and granted appellees' motion to dismiss on the ground of *forum non conveniens*. *Altman* v. *Central of Georgia R. Co.*, —— F. Supp. ——. We affirm the order of the court denying the motion of appellants to add Southern as an additional party defendant. No relief is sought and no complaint is made against Southern. However, we are of opinion that appellants are entitled to maintain their suit in this jurisdiction, and therefore we reverse the order dismissing the complaint.

In *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508, while it is said, "The doctrine [of *forum non conveniens*] leaves much to the discretion of the court to which plaintiff resorts," the Court adds, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." However, against the view of the Circuit Court of Appeals, the Supreme Court sustained the District Court as not having exceeded "its powers or the bounds of its discretion in dismissing plaintiff's complaint and remitting him to the courts of his own community." The action was in tort, initiated in a District Court in New York "solely because of diversity in citizenship of the parties." In agreeing with the District Court's exercise of discretion the Court pointed out that "the appropriate place for trial is Virginia, where the plaintiff lives and defendant does business, where all events in litigation took place, where most of the witnesses reside. . . ."

In *Koster* v. *Lumbermens Mutual Co.*, 330 U.S. 518, the District Court's discretion, exercised to refuse jurisdiction on the grounds of *forum non conveniens*, was also upheld both by the Circuit Court and the Supreme Court. But the corporate defendant there had no relationship to the chosen forum comparable to the relationship of Central to this jurisdiction in this suit involving dividends on

preferred stock; nor did the plaintiff show any reason of convenience for the forum he chose, while in our case, as shall more fully appear, plaintiffs have substantial reasons for filing their suit in the District of Columbia.[1]

In *Williams* v. *Green Bay & W. R. Co.*, 326 U.S. 549, a suit filed in the forum of the residence of the plaintiffs to recover of a foreign corporation amounts due under debentures held by plaintiffs, the Court did not accept as valid the District Court's exercise of discretion in declining to hear the case on the ground of *forum non conveniens*. Of the three cases *Williams* most closely resembles ours.

In passing upon the question the nature of the issue raised by the complaint is important. The problem here concerns the financial management of Central under its charter. The operation of the railroad in other respects is not importantly involved. It is immaterial that nearly all of the employees engaged in the physical maintenance and operation of the railroad are in Georgia, where 71% of the rail lines of Central are located. Much more important is the fact that financial control of Central is centered in this jurisdiction. Ownership of 96% of all the stock of Central, including 93% of its preferred stock, is in Southern, whose headquarters is here. Moreover, Central's Chief Executive Officer, its Comptroller, its Treasurer, and two of its Vice Presidents, are present in this jurisdiction, and detailed reports of the financial condition of Central are on file with the Interstate Commerce Commission.

The position of the Board of Directors on the dividend issue is not shown to require the testimony of anyone not already present in or easily available to this jurisdiction.

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[1] *Koster*, as is the present case, was a stockholder's derivative suit. But the differences are meaningful. Nine of 151 preferred stockholders of Central have addresses in the District of Columbia. These nine own over 93% of the preferred stock. The same number, owning less than 7%, reside in Georgia. The remaining 133 are scattered throughout 29 other jurisdictions.

Insofar as the record shows Washington is about as convenient to Central as is Georgia on the dividend issue. Though it is of some importance that twenty of the 21 directors are non-residents, 15 of them resident in Georgia, it does not appear that they would be needed as witnesses or, if any of them would be needed, how many and where they are. The Chairman of Central's Board, who has been served in this jurisdiction, is also President of Southern which controls Central; and Central's Comptroller, who is here, is also Comptroller of Southern. The control of Central by Southern outweighs the relevance, on the present issue, of the residence of a majority of the Directors, especially when Southern's headquarters and several of the officers directly concerned with the financial affairs of Central are present in this jurisdiction.

Whatever convenience would accrue to appellees were the litigation conducted in Georgia does not outweigh the inconvenience to plaintiffs in having their complaint dismissed.[2] We assume, in reaching this conclusion, that the case might be reached earlier for trial in Georgia than in our District Court, though there is no clear basis for divining the timing of the ultimate disposition of the litigation in one jurisdiction compared with the other.

The decisions rarely support invocation of the doctrine *forum non conveniens,* and when they do it is to prevent imposition upon a defendant of undue vexation or oppressiveness. *Williams* v. *Green Bay & W. R. Co., supra* at 554, 560. But the District of Columbia was a reasonable and natural place for appellants to bring their action against Central if they were to bring it all. Whatever vexation, harassment or oppressiveness is caused Central is not attributable to the choice of the forum.

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[2] Dismissal requires a stronger showing of inconvenience than a transfer under Section 1404(a). *Norwood* v. *Kirkpatrick,* 349 U.S. 29; *North Branch Products, Inc.* v. *Fisher,* 109 U.S. App. D.C. 182, 184 n.3, 284 F.2d 611, 613 n.3 (dictum).

We conclude that the order of dismissal on the ground stated deprived plaintiffs of their right to maintain their suit in this jurisdiction.

In so far as it dismissed the complaint the order is reversed and the case is remanded. In other respects the order is affirmed.

DANAHER, *Circuit Judge,* dissenting in part and concurring in part: I would not reverse the District Court's order which resulted in dismissal of the complaint. On this aspect of the case I would rest upon the opinion of District Judge Robinson,[1] for I think he has correctly exercised his discretion.

In all other respects I concur with the disposition commanded by the majority.

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[1] Altman v. Central of Georgia Railway Co., —— F. Supp. —— (D.D.C., Sept. 29, 1965).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 547-65

OSCAR L. ALTMAN, ET AL., *Plaintiffs*,

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, ET AL., *Defendants*.

ORDER

Upon consideration of the motion of defendants Central of Georgia Railway Company and D. W. Brosnan to dismiss this action, and the motion of the plaintiffs for leave to add Southern Railway Company as an additional party defendant, the pleadings, exhibits and affidavits on file, the memoranda in support of and in opposition to the respective motions and the arguments of counsel, it is, for reasons stated in the opinion of the Court filed herewith, this 29th day of September, 1965,

ORDERED that the motion of the plaintiffs for leave to add Southern Railway Company as an additional party defendant be and hereby is denied; and it is further

ORDERED that the motion of the above-named defendants to dismiss this action be and hereby is granted, and that this action be and hereby is dismissed without prejudice, and that the defendants recover of the plaintiffs their respective costs of action.

(Signed) SPORTSWOOD W. ROBINSON, III
Judge

OPINION

Victor A. Altman, of Washington, D. C., for the plaintiffs.

Gerhard A. Gesell, Bingham B. Leverich and Covington & Burling, of Washington, D. C., and John B. Miller and Hitch, Miller, Beckmann & Simpson, of Savannah, Ga., for defendants Central of Georgia Railway Company and D. W. Brosnan.

This is a class action brought by two owners of shares of the preferred stock of a foreign corporation seeking an order compelling the declaration and payment of dividends thereon for four past years, and directing a good faith determination of dividend policy for future years.

One of the plaintiffs is a citizen of the District of Columbia, and the other a citizen of New Jersey. Defendant Central of Georgia Railway Company (Central) is a Georgia corporation maintaining an office in the District, and the remaining defendants are the members of its board of directors.[1] Preferred stockholders, under Central's charter, are entitled to receive annual fixed percentage dividends out of and to the extent of available net income, and unpaid dividends are cumulative to a specified maximum.

In 1963, Southern Railway Company[2] (Southern) became the owner of nearly all[3] of Central's combined common and preferred stock in consequence of activities for its acquisition extending from 1960. Subsequently, Central and Southern, though remaining separate corporations, combined substantial portions of their operations with

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[1] Only one of the individual defendants has been served.

[2] Southern is a Virginia corporation. Its principal place of business is alleged to be in the District of Columbia.

[3] It currently owns 96.22% of the combined common and preferred shares of Central's stock.

a view to improvements in their services and the realization of economies for both companies.

Central has not paid any dividends on its preferred stock for four years, 1960 through 1963. The plaintiffs claim that it had net income available for payment of such dividends during each of these years, and that its directors acted arbitrarily in refusing to do so.

The defendants moved to dismiss the action, after which the plaintiff asked leave to join Southern as an additional party defendant. It is to these motions, and the grounds respectively asserted in their support, that the Court now addresses itself, altering the chronological order of the motions and the grounds somewhat to facilitate discussion.

I

Although the plaintiffs seek to compel the declaration of corporate dividends, only one of Central's 21 directors resides and has been served within the District of Columbia. From aught that appears, it is improbable that personal jurisdiction can be acquired over any of the rest. Deeming a quorum of the directors[4] to be parties indispensable to this action, the defendants urge that the Court cannot proceed.

The question is one of first impression here, and divergent results have been reached elsewhere. In *Schuckman* v. *Rubenstein*,[5] judicial authority was considered to be

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[4] This is predicated upon the general proposition that dividends can be declared only by majority vote of a quorum of directors. Central's by-laws, fully binding on its stockholders, see Gwin v. Thunderbird Motor Hotels, 216 Ga. 652, 119 S.E.2d 14 (1961), fix a quorum of its board of directors at six.

[5] 164 F.2d 952 (6th Cir. 1947), cert. denied 333 U.S. 875, 68 S.Ct. 905, 92 L.Ed. 1151 (1948).

"limited to a judgment in personam[6] against the members of the board,"[7] and it was accordingly held that "[j]urisdiction over only two of the nine directors in this case made it impossible for the court to render an effective decree. At least three other directors were indispensable parties to the suit."[8] Similarly, in *Tower Hill Connellsville Coke Co.* v. *Piedmont Coal Co.*,[9] it was concluded that "any effort on the part of the court below to direct the payment of any specific dividends * * * would be an effort to control the management of that company, and could not be done without making its officers and directors parties."[10]

On the other hand, in *Kroese* v. *General Steel Castings Corp.*,[11] where the suit involved only three of twelve corporate directors, the Court, disputing that "the case is as easily settled as the mechanical application of this well-settled rule about jurisdiction in personam would settle it,"[12] pointed out that "when a court steps in and orders the payment of a dividend, the corporate affairs have reached the point where the judgment of the directors is no longer controlling. The set of facts presented is such

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[6] "The declaration of a dividend is largely a matter of discretion with the board of directors and there will be no interference by the courts with the board's decision unless this discretion has been wilfully abused or the directors have been guilty of bad faith or a neglect of duty. The court itself cannot declare a dividend; its power is limited to a judgment in personam against the members of the board." 164 F.2d at 957.

[7] 164 F.2d at 957.

[8] Ibid.

[9] 33 F.2d 703 (4th Cir. 1929), cert. denied 280 U.S. 607, 50 S.Ct. 157, 74 L.Ed. 650 (1929).

[10] Id. at 706.

[11] 179 F.2d 760, 15 A.L.R.2d 1117 (3d Cir. 1950), cert. denied 339 U.S. 983, 70 S.Ct. 1026, 94 L.Ed. 1386 (1950).

[12] 179 F.2d at 763.

that the court substitutes its judgment, based on a rule of law, for the ordinary business judgment of those in charge of the business enterprise."[13] Consequently, said the Court, "[i]n such a case, even though individual directors are joined as parties, they are not called upon to exercise any business discretion. The case has passed that point, * * * The duty of a corporation to pay dividends then and there has been imposed by the judgment of the court, not by the ayes and nays of the members of the board,"[14] and since the corporation had assets within the Court's jurisdiction, it perceived no difficulty in making its decree effective. In similar fashion, it was held in *Doherty* v. *Mutual Warehouse Co.*,[15] that since "[t]he corporation is the party from whom any dividends that may be declared must be recovered,"[16] "the district court has jurisdiction to compel the declaration of dividends even in the absence of a majority of the board of directors."[17]

The views last expressed find additional support in other decisions,[18] and in commentaries on the question,[19] and they are adopted here. The corporation is already before the Court, and despite the fact that it owns no property in this jurisdiction, an effective and enforceable decree can yet be made. "To doubt its effectiveness is to doubt

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[13] Ibid.

[14] Id. at 763-764.

[15] 245 F.2d 609 (5th Cir. 1957).

[16] Id. at 612.

[17] Ibid.

[18] Whittemore v. Continental Mills, 98 F.Supp. 387 (D.Me. 1951); W. Q. O'Neall Co. v. O'Neall, 108 Ind.App. 116, 25 N.E.2d 656 (1940); Swinton v. W. J. Bush & Co., 102 N.Y.S.2d 994 (Sup.Ct. 1951), aff'd 103 N.Y.S.2d 1019 (1st Dep't 1951).

[19] Notes 36 Corn. L.Q. 744 (1951); 49 Mich.L.Rev. 275 (1950); 35 Minn.L.Rev. 93 (1950); 98 U.Pa.L.Rev. 753 (1950). See also 61 Harv.L.Rev. 1253 (1948), criticizing Schuckman, supra.

the power of a court of equity when wielded by a chancellor with legal imagination. * * * Equity courts have known for a long time how to impose onerous alternatives at home to the performance of affirmative acts abroad as a means of getting those affirmative acts accomplished.''[20]

II

As ground for their motion for leave to add Southern as a party defendant, the plaintiffs point to the size of its stock ownership and from this argue that it ''is in effective control of'' Central and has caused Central ''arbitrarily'' not to pay dividends on its preferred shares.

The complaint is cast in terms of a classic stockholders' class action against Central and its directors. Neither it, nor the plaintiffs' sole affidavit supporting the motion, charges Southern with any wrongdoing or impropriety, or indicates any action by it contributing to Central's failure to declare the dividends. Nor is any relief whatsoever sought against Southern in the complaint. Given maximum breadth, the plaintiffs' claim is no more than that Central's directors established dividend policy with the fact in mind that from 1960 to 1963 Southern was endeavoring to acquire, and since 1963 it has owned, the bulk of Central's stock.

This, at most, gives cause for complaint only against Central and its directors. Southern's ownership of the stock is perfectly legal,[21] and there is nothing to suggest that it has in any way attempted to use its power to dictate or influence action by Central's directors. If simply be-

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[20] Kroese v. General Steel Castings Corp., supra note 11, 179 F.2d at 765-766.

[21] In November, 1962, the Interstate Commerce Commission approved Southern's acquisition of control of Central through ownership of its capital stock and, through Central, indirect control of its carrier subsidiaries. Southern Railway Company—Control—Central of Georgia Railway Company, 317 I.C.C. 557 (1962).

cause of Southern's anticipated and actual stockholdings those directors decided not to declare dividends, the responsibility is their's alone.

It is elementary that the complaint must state "a claim showing that the pleader is entitled to relief,"[22] against a party and this complaint does not involve Southern in the dispute. The claim stated

> "* * * must show that the claimant is 'entitled to relief.' That is to say, the claim for relief must indicate the existence of a cause of action. By cause of action in this context is meant a claim that facts exist which, under our legal system, are recognized as entitling the claimant to judicial action in vindication of a right or in remedying a wrong. * * * Courts are not authorized to require a party defendant to defend against a 'cause' not recognized by law as involving the vindication of a legal right or the remedying of a legal wrong."[23]

But the claim stated here "has not set forth either the acts or omissions on which it relies nor the theory it advances as a basis of liability"[24] against Southern. Nor does it, as to Southern, "indicate clearly the defendants against whom relief is sought and the basis upon which the relief is sought against the particular defendants."[25] Under even the liberal standards by which the complaint here must be viewed, it asserts no case against Southern.

The prayer of the complaint, it is repeated, is limited to relief against Central and its directors, and does not

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[22] F.R.Civ.P. 8(a)(2).

[23] Gold Seal Co. v. Weeks, 93 U.S.App.D.C. 249, 255-256, 209 F.2d 802, 807-808 (1954).

[24] Heintz & Co. v. Provident Tradesmen's Bank & Trust Co., 29 F.R.D. 144, 145 (E.D.Pa. 1961).

[25] Mathews v. Kilroe, 170 F.Supp. 416, 417 (S.D.N.Y. 1959). See also 2 Moore, Federal Practice ¶ 8.13 at 1705 (2d ed. 1958).

mention Southern at all. But the plaintiffs have suggested that Southern might be ordered to vote its stock in such manner that Central will declare dividends on its preferred shares. But this power resides in Central's directors, not its stockholders, and any action the latter, *qua* stockholders, might take in this regard would be completely ineffective.[26] It is the directors who "are to administer the corporate affairs for the common benefit of all the stockholders,"[27] including Southern as well as others.

Southern could, of course, so vote its stock when directors are elected that candidates committed to declaring such dividends might be placed in office. But no case had been found to support the proposition that leverage for a declaration of corporate dividends may be supplied through an order running against a stockholder not alleged to have itself committed a legal violation as to how its stock must be voted. Judicial decrees remedying legal wrongs operate directly upon the wrongdoers, and not upon parties innocent of legal offense even to reach those guilty of the wrongdoing. The relief the plaintiffs wish may be afforded, if it is otherwise proper to do so, by an order directed against the corporation that is already here, and no justification for Southern's joinder appears.[28]

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[26] Knapp v. Bankers Securities Corporation, 230 F.2d 717, 720 (3d Cir. 1956).

[27] 3 Fletcher, Private Corporations § 838 at 178 (perm. ed. rev. repl. 1965). See also King Manufacturing Co. v. Clay, 216 Ga. 581, 118 S.E.2d 581 (1961); Oliver v. Oliver, 118 Ga. 362, 45 S.E. 232 (1903); Hurt v. Cotton States Fertilizer Co., 159 F.2d 52 (5th Cir. 1947), cert. denied 331 U.S. 828, 67 S.Ct. 1351, 91 L.Ed. 1843 (1947); Gaynor v. Buckley, 203 F.Supp. 620 (D.Ore. 1962), aff'd 318 F.2d 432 (9th Cir. 1963).

[28] See General Investment Co. v. Lake Shore & M.S. Ry. Co., 250 Fed. 160 (6th Cir. 1918); Sabre v. United Traction & Electric Co., 156 Fed. 79 (C.C.R.I. 1907); Subers v. Continental Securities, 12 Del.Ch. 236, 111 Atl. 433 (1920); Southwestern Portland Cement Co. v. Latta & Happer, 193 S.W. 1115 (Tex.Civ.App. 1917).

Were the plaintiffs' difficulty on their motion a matter potentially correctable by amendment, their request for leave to amend would invoke a broad discretion. But at the hearing, counsel for the plaintiffs made it plain that they stand on the complaint as drawn insofar as Southern is concerned, and that no amendment is desired. Since the complaint provides no basis for the action the motion seeks, the motion will be denied.

III

The defendants also predicate their motion to dismiss on two grounds additional to the one discussed and considered in Part I. The first of the additional grounds is that the complaint impermissibly seeks relief tantamount to judicial regulation of the internal affairs of a foreign corporation. The second is the conventional doctrine of *forum non conveniens*. Although the defendants have presented each as an independent basis for dismissal, the first is properly to be considered only a part of the second,[29] and will accordingly be so treated.

As the cases state, the plaintiff's choice of forum will not be disturbed unless the balance of convenience is strongly in favor of the defendant.[30] This is particularly true where the plaintiff sues in a court at the place of

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[29] See Koster v. (American) Lumbermens Mutual Casualty Co., 330 U.S. 518, 527, 67 S.Ct. 828, 833, 91 L.Ed. 1067, 1076 (1947), quoted infra note 33.

[30] Gulf Oil Co. v. Gilbert, 330 U.S. 501, 508, 67 S.Ct. 838, 843, 91 L.Ed. 1055, 1062 (1947); North Branch Products, Inc. v. Fisher, 109 U.S.App.D.C. 182, 184, 284 F.2d 611, 613 (1960), cert. denied 365 U.S. 827, 81 S.Ct. 713, 5 L.Ed.2d 705 (1961); Caspar v. Devine, 103 U.S.App.D.C. 193, 194-195, 257 F.2d 197, 198-199 (1958); Daquila v. Schlosberg, 102 U.S.App.D.C. 366, 367, 253 F.2d 888, 889 (1958); Blake v. Capitol Greyhound Lines, 95 U.S.App.D.C. 334, 336, 222 F.2d 25, 26-27 (1955); Gross v. Owen, 95 U.S.App.D.C. 222, 221 F.2d 94, 95 (1955); Wiren v. Laws, 90 U.S.App.D.C. 105, 107, 194 F.2d 873, 874-875 (1951), cert. denied 346 U.S. 938, 74 S.Ct. 378, 98 L.Ed. 426 (1954).

his residence,[31] and one of the plaintiffs here is a citizen of the District of Columbia. But the force of this consideration is lessened by the character of the litigation as defined by the plaintiffs themselves. In a class action, such as this, in which the plaintiff sues on behalf of himself and all other preferred stockholders,[32] the appropriateness of the home forum is weakened.[33] And, in all other significant aspects of the case, the showing the defendants make has power more than ample to bring to a halt further litigation in this Court.

Central and all but one of the remaining defendants are nonresidents of the District of Columbia.[34] And not only is Central incorporated under Georgia law, but it is a Georgia corporation in the fullest sense of the word. Its principal place of business is there, its operations are

[31] See Koster v. (American) Lumbermens Mutual Casualty Co., supra note 29; Daquila v. Schlosberg, supra note 30.

[32] The preferred stockholders on whose behalf plaintiffs brought this action are scattered throughout 30 states and one foreign country.

[33] In Koster v. (American) Lumbermens Mutual Casualty Co., supra note 29, the Court, speaking in a stockholders' derivative suit, said: "But where there are hundreds of potential plaintiffs, all equally entitled voluntarily to invest themselves with the corporation's cause of action and all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened." 330 U.S. at 524, 67 S.Ct. at 832, 91 L.Ed. at 1074.

[34] Gulf Oil Corp. v. Gilbert, supra note 30, 330 U.S. at 509, 67 S.Ct. at 843, 91 L.Ed. at 1062-1063; Nee v. Dillon, 99 U.S.App. D.C. 332, 334, 239 F.2d 953, 955 (1956); Gross v. Owen, supra note 30, 95 U.S.App.D.C. at 223, 221 F.2d at 95-96; Simons v. Simons, 88 U.S.App.D.C. 180, 181, 187 F.2d 364, 365 (1951), cert. denied 341 U.S. 951, 71 S.Ct. 1019, 95 L.Ed. 1374 (1951); Curley v. Curley, 74 App.D.C. 163, 164, 120 F.2d 730, 731 (1941), cert. denied 314 U.S. 614, 62 S.Ct. 114, 86 L.Ed. 494 (1941). See also Urquhart v. American-LaFrance Foamite Corp., 79 U.S.App. D.C. 219, 221-222, 144 F.2d 542, 544-545 (1945), cert. denied 323 U.S. 783, 65 S.Ct. 273, 89 L.Ed. 625 (1944).

centered there,[35] and almost all of its property is located there.[36] Regular meetings of its stockholders and board of directors have traditionally been held in Georgia, most of its corporate records are kept in Georgia, [37] and the vast majority of its directors and employees are Georgia residents.[38] By contrast, its contacts with the District of Columbia are minimal.[39]

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[35] Central operates a total railroad mainline mileage of approximately 1,745 miles of which 1,253, or 71.8% is located in Georgia, 489 miles or 28.02% in Alabama, and 3 or 0.18% in Tennessee. In 1962 it transported 6,645,168,000 gross ton miles of which 4,656,070,000 or 70%, was transported in Georgia.

[36] The assets of Central and its subsidiaries are located in Georgia, Alabama, Tennessee and New York with the overwhelming proportion in Georgia.

[37] The minutes of the meetings of Central's stockholders, board of directors and executive committee subsequent to July 17, 1963, are maintained in New York with copies in Savannah. For all periods prior to that time they are maintained in Savannah.

Central maintains its accounting records by use of machines and computers located at Atlanta. The supporting records relating to maintenance and operations are all found at Atlanta since this is where data are reported for programming or coding in the machine accounting system. As would be expected, these records are voluminous. Only a small volume of pertinent financial records are maintained in the District of Columbia.

[38] Fifteen of its 21 directors, and 1,494 of its 1,502 employees, are residents of Georgia. Its president and executive vice president, who during the period in question regularly consulted the board of directors on dividend matters, are stationed in Savannah. Its principal officers concerned with day-to-day operations and maintenance are stationed in Atlanta.

[39] Central has never owned or operated any railroad line or related facilities within the District of Columbia, and it has no trackage rights over any line in the District. It does not provide any passenger or freight service directly or indirectly to or from the District. The extent of its contacts in the District is the solicitation of freight, principally from the Government, for movement over its system in Georgia, Alabama and Tennessee.

Central and its subsidiaries have no bank accounts or other assets in the District. Meetings of Stockholders or directors are never held here. Only one director and eight employees reside here.

The plaintiffs' action, by its very nature, will compel detailed inquiry into various aspects of Central's internal affairs. If its directors reached a bona fide decision, based on all relevant business considerations, that it would not serve the company's best interests to declare dividends on preferred stock, that decision may not be overturned judicially.[40] Among the considerations to be taken into account, at least by the defendants' theory, are Central's recent reorganization and its emergence with substantial deferred maintenance and obsolete equipment, the urgency of its needs to upgrade its trackage and rolling stock, its public responsibility to maintain its right of way and equipment in safe working condition, its labor policy with respect to increased wages and other benefits, and the long range importance of the business which it had been steadily losing to competitive railroads as a result of its shortage of adequate and modern equipment.

The location of the witnesses is an important consideration in determining whether *forum non conveniens* should be applied.[41] It is evident that the bulk of the witnesses whose testimony must necessarily be heard are outside the District of Columbia, beyond the reach of process from this Court.[42] Only one of Central's directors is here, but 15 are in Georgia; only eight of about 1,500 employees are here. Despite the defendants' challenge to continued proceedings here, the plaintiffs have not identified any witness

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[40] See Malone v. Armor Insulating Co., 191 Ga. 146, 12 S.E.2d 299 (1940); Bartow Lumber Co. v. Enwright, 131 Ga. 329, 62 S.E. 233 (1908); Annot. 27 A.L.R.2d 1073 (1953).

[41] Gulf Oil Corp. v. Gilbert, supra note 30, 330 U.S. at 509-511, 67 S.Ct. at 843, 91 L.Ed. at 1063-1064; Nee v. Dillon, supra note 34, 99 U.S.App.D.C. at 333, 239 F.2d at 954; Gross v. Owen, supra note 30, 95 U.S.App.D.C. at 222, 221 F.2d at 95.

[42] Gulf Oil Corp. v. Gilbert, supra note 30, 330 U.S. at 509-511, 67 S.Ct. at 843, 91 L.Ed. at 1062.

within the District,[43] and aside from the plaintiffs themselves, and the one director and possibly the handful of employees here, no prospect of any other is seen.

Accessibility of sources of proof, another important factor,[44] cannot be approached outside Georgia. The records and documents that trial of the issues would inevitably necessitate are concentrated overwhelmingly there.[45] So also are those who handle those records.[46] And the plaintiffs have pointed to no documentary evidence within the District that would be needed in or would be relevant to this action.[47]

The place of occurrence of the activities by reason of which suit is occasioned plays a large role in *forum non conveniens* cases.[48] The necessity for application of law foreign to the forum does so also.[49] All important events in this litigation occurred outside of the District, and this Court would be required to apply principles of law not its own to resolve the issues if they are tried here. Although

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[43] See Koster v. (American) Lumbermens Mutual Casualty Co., supra note 29, 330 U.S. at 526, 67 S.Ct. at 832, 91 L.Ed. at 1075; Gulf Oil Corp. v. Gilbert, supra note 30, 330 U.S. at 508, 67 S.Ct. at 843, 91 L.Ed. at 1062.

[44] Gulf Oil Corp. v. Gilbert, supra note 30, 330 U.S. at 508, 67 S.Ct. at 843, 91 L.Ed. at 1062.

[45] See note 37, supra.

[46] Over 90% of Central's accounting personnel are located either at Atlanta or Macon, Georgia.

[47] See Koster v. (American) Lumbermens Mutual Casualty Co., supra note 29, 330 U.S. at 526, 67 S.Ct. at 832, 91 L.Ed. at 1075.

[48] Gulf Oil Corp. v. Gilbert, supra note 30, 330 U.S. at 509, 67 S.Ct. at 843, 91 L.Ed. at 1062-1063; Nee v. Dillon, supra note 34, 99 U.S.App.D.C. at 334, 239 F.2d at 955; Blake v. Capitol Greyhound Lines, supra note 30, 95 U.S.App.D.C. at 335-336, 222 F.2d at 26; Gross v. Owen, supra note 30, 95 U.S.App.D.C. at 222-223, 221 F.2d at 95-96.

[49] Gulf Oil Corp. v. Gilbert, supra note 30, 330 U.S. at 509, 511-512, 67 S.Ct. at 844, 91 L.Ed. at 1063-1064; Nee v. Dillon, supra note 34, 99 U.S.App.D.C. at 334, 239 F.2d at 955.

the fact that Central's internal affairs must be deeply probed is not alone sufficient to warrant dismissal of the action,[50] it is a circumstance to be given weight in the determination.[51] And while the difficulties of utilizing foreign law in judicial decisions would not of itself justify shunting the case to Georgia,[52] it is another factor to be carefully considered.[53]

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[50] In Koster v. (American) Lumbermens Mutual Casualty Co., supra note 29, 330 U.S. 527, 67 S.Ct. 833, 91 L.Ed. 1076, the Court said: "There is no rule of law, moreover, which requires dismissal of a suitor from the forum on a mere showing that the trial will involve issues which relate to the internal affairs of a foreign corporation. That is one, but only one, factor which may show convenience of parties or witnesses, the appropriateness of trial in a forum familiar with the law of the corporation's domicile, and the enforceability of the remedy if one be granted. But the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice."

[51] Williams v. Green Bay & W.R.Co., 326 U.S. 549, 66 S.Ct. 284, 90 L.Ed. 311 (1946); Bellvue Gardens, Inc. v. Hill, 111 U.S.App. D.C. 343, 297 F.2d 185 (1961); Mayflower Hotel Stockholders Protective Committee v. Mayflower Hotel Corp., 89 U.S.App.D.C. 171, 193 F.2d 666 (1951). Cf. Rogers v. Guaranty Trust Co., 288 U.S. 123, 53 S.Ct. 295, 77 L.Ed. 652 (1933); Beasley v. Mutual Housing Co., 59 App.D.C. 245, 39 F.2d 290 (1930); Macarone v. Big Sign Shop, 59 App.D.C. 345, 41 F.2d 567 (1930).

[52] "The fact that the corporation law of another State is involved does not set the case apart for special treatment. The problem of ascertaining the state law may often be difficult. But that is not a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case properly before it." Williams v. Green Bay & W.R. Co., supra note 51, 326 U.S. at 553, 66 S.Ct. at 286, 91 L.Ed. at 314.

[53] "There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself. * * * If trial was in a state court, it could apply its own law to events occurring there. If in a federal court by reason of diversity of citizenship, the court would apply the law of its own state in which it is likely to be experienced." Gulf Oil Corp. v. Gilbert, supra note 30, 330 U.S. at 509, 511, 67 S.Ct. 843, 844, 91 L.Ed. at 1063, 1064.

Heavily involved here, too, is the public interest in avoiding litigation in a community unrelated to it, and in having localized controversies decided at home. It is of the very essence of *forum non conveniens* "that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."[54] "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin."[55] The courts of the District of Columbia are, of course, open to all litigants who have good reason to utilize them. But the exigencies of this Court's docket[56] and its responsibilities to the Washington community[57] necessitate that access be denied where local concern in the litigated matter is at best very remote.

We must remember also that we are dealing, not with a general commercial corporation, but rather with one performing an important public service, particularly to the citizens of Georgia. We are, too, involved with the charge that those to whom the management and destiny of the corporation have by Georgia law been confided have not properly performed one of the duties of their offices. And

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[54] Gulf Oil Corp. v. Gilbert, supra note 30, 330 U.S. at 507, 67 S.Ct. at 842, 91 L.Ed. at 1062.

[55] Id. at 508.

[56] Gulf Oil Corp. v. Gilbert, supra note 30, 330 U.S. at 508-509, 67 S.Ct. at 843, 91 L.Ed. at 1062-1063; Daquila v. Schlosberg, supra note 30, 102 U.S.App.D.C. at 367, 253 F.2d 889; Nee v. Dillon, supra note 34, 99 U.S.App.D.C. at 334, 239 F.2d at 955; Gross v. Owen, supra note 30, 95 U.S.App.D.C. at 223, 221 F.2d at 95-96; Simons v. Simons, supra note 34, 88 U.S.App.D.C. at 181, 187 F.2d at 365; Urquhart v. American La-France Foamite Corp., supra note 34, 79 U.S.App.D.C. at 222, 144 F.2d at 545.

[57] Gulf Oil Corp. v. Gilbert, supra note 30, 330 U.S. at 508-509, 67 S.Ct. at 843, 91 L.Ed. at 1062-1063; Gross v. Owen, supra note 30, 95 U.S.App.D.C. at 222-223, 221 F.2d at 95-96; Urquhart v. American La-France Foamite Corp., supra note 34, 79 U.S.App.D.C. at 221, 144 F.2d at 544.

it is to them as a class that Georgia displays special concern by her requirement that a majority of their group be residents of that state.[58] An undertaking, without adequate justification, to resolve the questions the complaint poses in this forum, rather than in a tribunal there, is fraught with all the sensitivities and dangers usually associated with unwarranted intrusions.

In sum, as to all of the "practical problems that make trial easy, expeditious and inexpensive,"[59] as well as the considerations vital to the public at large, the courts in Georgia have far more to offer.[60] Objective evaluation of all factors related to the interests and conveniences of the parties and witnesses, the litigation itself and orderly administration of the law, leads inevitably to the conclusion that the action must be discontinued here.[61]

[58] Ga. Code § 94-203 (1933).

[59] Gulf Oil Corp. v. Gilbert, supra note 30, 330 U.S. at 508, 67 S.Ct. at 843, 91 L.Ed. at 1062.

[60] Considering the theory of the complaint and the nature of the relief sought, no problem respecting a statute of limitations is envisioned. See Ochs v. David Maydole Hammer, Co., 138 Misc. 665, 246 N.Y.Supp. 539, 543 (1930).

[61] Williams v. Green Bay & W.R. Co., supra note 51, is clearly distinguishable. A class suit to recover amounts allegedly payable out of earnings in lieu of interest under debentures of a Wisconsin corporation was held to be maintainable in a district court in New York, but, as the Court said: "Nor can we conclude that the maintenance of this suit in New York will be vexatious or oppressive. Petitioners, as we have said, reside there. While respondent's railroad lines are wholly in Wisconsin, it does business in New York. The Class B debentures are listed and traded in on the New York Stock Exchange. The amounts payable on them in lieu of interest are payable in New York. Respondent maintains its financial as well as a traffic office in New York. It maintains a bank account in New York, not only to take care of obligations under its securities, but also to handle excess operating funds not needed in Wisconsin. Five of respondent's six directors are to be found in New York. These five officers include all the executive and fiscal officers, except the president who super-

IV

Were it possible, in lieu of dismissal of this action on *forum non conveniens,* to transfer it to the appropriate federal district court in Georgia,[62] the Court would pursue

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vises operations in Wisconsin and the general auditor who is in Wisconsin. Directors' meetings are customarily held in New York. Two of the three members of the executive committee, which acts for the board between meetings, are to be found in New York. Financial records, transfer books, minute books and the like are kept in New York. These facts plainly indicate to us that it would not be vexatious or oppressive to entertain this suit in New York, whether the availability of witnesses or any other aspect of a trial be considered." 326 U.S. at 559-560, 66 S.Ct. at 289-290, 90 L.Ed. at 318.

This case is more like Koster v. (American) Lumbermens Mutual Casualty Co., supra note 29, where a stockholders' derivative suit brought by a New York resident against an Illinois corporation was dismissed under forum non conveniens, where the situation was described: "* * * Lumbermens does business in forty-eight states, but its home and principal place of business are in Illinois. There its directors live; there all records are kept; and no witness shown to be necessary to either side of the case resides outside of Illinois. The plaintiff himself lives in New York, but he does not appear to have attended any meetings of policyholders or to have raised objections to the acts alleged, or otherwise to have personal knowledge so that he could possibly be a witness except as to his ownership of the policy of insurance which is not denied. It would appear necessary for him to make his own case largely from books and records in Chicago and from testimony of officers and witnesses resident there. It is also evident that legality of many of these transactions will turn on the law of Illinois, under which Lumbermens exists and within whose territory the questioned acts took place. That would be home law if the case were tried in Chicago; it would be foreign law to New York and the case, if tried there, would involve conflict of laws. It also is urged that plaintiff's total of premium payments is less than $250, which would be the maximum possible interest he personally could have in the controversy." 330 U.S. at 520, 521, 67 S.Ct. at 830, 91 L.Ed. at 1072.

[62] "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

that course.[63] Transfer of an action, however, although otherwise proper, is limited by the terms of the statute to a "district or division where it might have been brought." The only possible basis of federal jurisdiction of this action outside the District of Columbia would have been diverse citizenship of the parties.[64] But the action embraces one plaintiff and one defendant who, as the complaint states, have common citizenship in the District, and that defendant is properly before the Court.[65] Diversity of citizenship having thus been destroyed from the moment of institution of this action, no transfer is possible,[66] and it must be dismissed.

(Signed) SPOTTSWOOD W. ROBINSON, III
Judge

September 29, 1965

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[63] Blake v. Capitol Greyhound Lines, 95 U.S.App.D.C. 334, 222 F.2d 25 (1955).

[64] 28 U.S.C. § 1332(c).

[65] Cf. Philip Carey Manufacturing Co. v. Taylor, 286 F.2d 782 (6th Cir. 1961), cert. denied 366 U.S. 948, 81 S.Ct. 1903, 6 L.Ed.2d 1242 (1960).

[66] Hoffman v. Blaski, 363 U.S. 335, 80 S.Ct. 1084, 4 L.Ed.2d 1254 (1960); Masterpiece Productions v. United Artists Corp., 94 F.Supp. 116 (S.D.N.Y. 1950).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 446

CENTRAL OF GEORGIA RAILWAY CO., *et al., Petitioners,*

v.

OSCAR L. ALTMAN, *et al., Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The District Court opinion is reported at 254 F. Supp. 167 (1965). The Court of Appeals opinion is as yet unreported. (App. A., p. 1a).[1]

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[1] "App." references are to the Appendices to petitioners' brief; "JA" references are to the Joint Appendix used before the Court of Appeals; copies have been filed in this Court.

JURISDICTION

The Court of Appeals judgment was entered on May 19, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals decision, that the District of Columbia was not *forum non conveniens,* was in accord with ruling decisions of this Court.

2. Whether petitioners have preserved their right to appeal the decision that service on a quorum of Central's Directors is not necessary, and if so, whether such service is essential to jurisdiction in the District Court.

STATUTE INVOLVED

Act of June 25, 1948, c. 646, 62 Stat. 937, U.S.C., Title 28 Sec. 1404(a).

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT

The present litigation concerns questions as to dismissal, on the grounds of *forum non conveniens,* of an action brought in plaintiffs' home forum.

Plaintiffs are two individuals who live and work in the District of Columbia, and who own 200 preferred shares of Central of Georgia Railway Co. (Central), a Georgia corporation operating a railroad mainly in Georgia and Alabama.

Plaintiffs sued in their home jurisdiction, the District of Columbia, on behalf of themselves and other preferred Central stockholders, for the declaration of preferred divi-

dends. Service was duly made on Central and two of its Directors:

> Mr. D. W. Brosnan, a resident of the District of Columbia, Chairman of the Board of Directors of Central and its Chief Executive Officer, who is also President of Southern Railway Company (Southern), a Virginia corporation, whose principal Executive Office is in the District of Columbia; and
>
> Mr. R. E. Franklin, also Southern's Vice President-Operations.

Connections With District of Columbia

Southern was granted authority by the Interstate Commerce Commission (ICC) to control Central by purchase of Central's capital stock. At the time suit was began, Southern owned 96.22% of total Central capital stock and 93.66% of Central preferred stock. Southern now owns 98.51% and 99.33% of Central preferred and common stock, respectively. (Pet. Br. 5).

Central has an office in the District of Columbia and does business here. Eight employees are in its office here. (App. B., p. 16a). These D. C. employees included five principal officers, namely:

1. Mr. Brosnan, Chairman of the Board and Chief Executive Officer;
2. Mr. Divine, Comptroller;
3. Mr. Smith, Treasurer;
4. Mr. Wilson, Vice President—Traffic; and
5. Mr. Hamilton, Vice President—Marketing and Research (JA 106).

Central's 1963 and 1964 Annual Reports to stockholders listed only three offices, its principal office in Savannah, Georgia; its Washington, D. C. office; and its New York

office. (JA 111). These Annual Reports were signed by Mr. Brosnan, Central's Chairman of the Board and Chief Executive Officer, whose headquarters are in D. C., and not by Mr. Dillard, Central's President, whose headquarters are in Savannah, Ga. (JA 111).

Central and its subsidiary, Savannah & Atlanta Ry., filed detailed Schedule A annual reports required by ICC under 49 U.S.C. Sec. 20. These reports were filed with the ICC in D. C. (JA 108). Central's 1964 Schedule A contained a verification under oath, executed in D. C. by Central's Comptroller, Mr. Divine, stating in part:

> "While the President and Board of Directors have the right to exercise control of the accounting of this company, they have delegated to the Comptroller the supervision of the books of account and the control of the manner in which such books are kept." (JA 108).

Similar verification was in the 1964 Schedule A of Savannah & Atlanta. (JA 108).

In its December 1964 monthly report of Employees, Services, and Compensation, filed with the ICC by Central, verification was by Mr. Luckett, Assistant Comptroller, and it bore the post office address for Mr. Luckett of "Washington, D. C." Similar verification and post office address were used in the monthly report of the Savannah & Atlanta for December 1964. (JA 108).

ICC records showed that Central was a party to two control proceedings before the ICC in Washington, D. C., namely those in which (a) the St. Louis-San Francisco Ry. Co. (Frisco) sought control of Central; and (b) Southern sought control of Central (JA 109).

After Southern won control of Central, Southern paid $30,859,842 for 96.22% of all Central shares. Southern combined substantial portions of its operations with those of Central, the object being the improvement of service and realization of economies for both companies. Steps toward

realizing the anticipated savings from the consolidation of the accounting, corporate secretary, treasury, tax, and other administrative functions were taken at once, as were the consolidation of operations such as freight agencies, yards and shops. (JA 106).

Most of Southern's principal officers are based in D. C., including:

1. Mr. Brosnan, President.
2. Mr. Franklin, Vice President—Operations.
3. Mr. Claytor, Vice President—Law.
4. Mr. Hamilton, Vice President—Marketing and Research.
5. Mr. Burk, Vice President—Sales.
6. Mr. Gidding, Vice President—Finance and Taxation.
7. Mr. Crane, Vice President—Engineering and Research.
8. Mr. Divine, Comptroller.
9. Mr. Young, Assistant to the President.
10. Mr. Smith, Treasurer. (JA 110).

Of these principal officers of Southern, four are also principal officers of Central, namely: Mr. Brosnan, Chairman of the Board and Chief Executive Officer; Mr. Divine, Comptroller; Mr. Smith, Treasurer; and Mr. Hamilton, Vice President—Marketing and Research. All official positions on the Savannah & Atlanta except the President are filled by officers of Southern. (JA 108).

Allegations of Plaintiffs

In support of plaintiffs' contention that Central and its Board of Directors had arbitrarily failed to pay preferred dividends for 1960 through 1964, the complaint alleged:

Beginning in 1955, Frisco applied for ICC approval to control Central by owning Central's stock. (JA 5). The

ICC rejected the application and ordered Frisco to divest itself of the Central shares. (JA 5).

Frisco then contracted in 1960 to sell Southern the Central shares, and Southern applied for ICC approval to control Central. (JA 5). While Frisco had sought control, Central paid preferred dividends—the last was for 1959. (JA 6). Thereafter, no preferred dividends have been paid. The Frisco-Southern contract provided that any Central preferred dividends were to go to Frisco, thus increasing the effective cost to Southern for the shares. (JA 6-7).

At all times from 1960 through 1963, Central had sufficient Available Net Income to pay each year the $5 preferred dividend (totaling $852,000 per year); and Central's consolidated surplus (available to pay dividends) at all times exceeded $27,000,000. (JA 4).

In support of its application to control Central, Southern advised the ICC that: Southern had been granted ICC approval to control other railroads which had then prospered under Southern's control (*Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557, 572 (1962)); that Southern control of Central would result in very large annual savings for both Central and Southern (*Ibid.*, p. 579); and that Southern relied on dividends on the Central shares to help meet Southern's acquisition costs (*Ibid.*, p. 559).[2]

The Complaint alleged that these representations to the ICC were meaningless and of no value to the minority

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[2] To show that Southern could easily buy the Central stock, Southern caused the ICC to find: "Giving effect to consummation of the transaction and anticipated economies, and *assuming a payout to applicant of 50 per cent of earnings applicable to the Central's common stock*, applicant's 1960 income of $42,720,657 available for fixed charges would be increased to $46,587,157 and the fixed-charge coverage, after tax adjustments, would be reduced to 3.44." (*Ibid.*, at 559, emphasis supplied).

stockholder, once Southern got control of Central, although Southern was one of the most efficient railways in the U. S. and its per cent of net income to gross revenue, is almost twice that of all class 1 railroads (JA 9); that Southern required Central to show no profit, so as to aid Southern in its continuing fight with the labor unions as to the protective provisions applicable to Central's employees (JA 10) (*Railway Labor Assn.* v. *U. S.*, 379 U.S. 199 (1964)); that Southern had caused Central unreasonably to increase its expenses for maintenance, in order to cause Central to show no earnings for federal income tax purposes (JA 10); that this policy caused no financial hardship to Southern, since it can deduct such "losses" of Central on the consolidated federal income tax return which Southern files with Central and other Southern subsidiaries (JA 10); that this policy injured Central's other preferred stockholders who own no other interest in Central or Southern and since the preferred is cumulative for only three years, if Southern succeeds in this action all additional arrearage since 1959 will be wiped out. (JA 11). Further, plaintiffs alleged that if Central succeeds in having this law suit dismissed, the Statute of Limitations of Georgia will bar at least two years of the cause of action alleged in the complaint. (Pl. Reply Br. in Ct. of App., p. 8).

Later Events

Instead of the savings forecast to the ICC of $3.8 million per year (JA 105), Central achieved far greater savings, although these savings have not been reported in net income. Southern forecast that its control would enable Central to eliminate between 814 and 824 jobs; actually, employment on Central dropped 2.3 times as much as forecast, from 3,421 employees in 1960 to 1,522 employees at the end of 1964, a decrease of 1,899 jobs. (JA 109). Similar economies were achieved on the Savannah & Atlanta, a wholly-owned, although indirectly owned, subsid-

iary of Central, with which Southern cannot file a consolidated federal income tax return. Savannah & Atlanta's net income rose from an average of $400,000 per year, before control (JA 4) to $1,042,231 in 1964, after control. (JA 108). Savannah & Atlanta's earnings are alone sufficient to pay the entire annual preferred dividend of $852,000. In 1964, Central received $1,949,825 in dividends from affiliated companies. (JA 108).

Neither Central, nor Directors Brosnah and Franklin, ever filed responsive pleadings to the complaint. Instead, they filed motions to dismiss. They presented no lists of names and addresses of witnesses; no abstracts of proposed testimony; and no detailed list of documents needed for their defense. Instead, they submitted only three short affidavits in support of their position, and their counsel made arguments. The District Court accepted some arguments of Central's attorneys as if they were verified facts. (App. B., p. 17a; Pl. Reply Br. in Ct. of App., p. 7).

The District Court granted the motions to dismiss. It rejected the argument that service was needed on a quorum of the Directors of Central; but decided that D. C. was *forum non conveniens.*

Plaintiffs appealed the decision on *forum non conveniens.* Defendants did not appeal the decision that a quorum was not required.

The Court of Appeals, by 2-1 decision, reversed the decision that D. C. was *forum non conveniens,* and remanded. It upheld the District Court's refusal to join Southern as defendant.

Defendants petitioned this Court for a Writ of Certiorari.

ARGUMENT

I. Introduction

This case is part of an effort begun more than ten years ago to seek fair play for Central's minority stockholders. Beginning in 1955, while Frisco sought ICC approval to control Central, plaintiff Victor A. Altman was an intervenor in the ICC proceeding. *Central of Georgia Ry. Co. Control,* 295 I.C.C. 563 (1957). Intervenor prayed the ICC, as a condition precedent to control, that Frisco be required to offer to buy the minority Central shares at a reasonable price to be fixed by the ICC (*Ibid.*, p. 566). Central opposed this relief to the minority stockholders. Division Four of the ICC granted intervenor's plea and ordered that control of Central be conditioned on Frisco's offer to buy the minority Central shares. (*Ibid.*, pp. 580-582).

Later, Division Four's approval of Frisco control was reversed by the full ICC because of the way Frisco had acted. *Central of Georgia Ry. Co. Control,* 307 I.C.C. 39 (1958). The full ICC not only denied Frisco's application; it asked for prosecution of Frisco stating:

> "Pursuant to section 12(1) of the act, we are referring this matter to the United States Attorney with request that prosecution be undertaken under the penal provisions of the act." (*Ibid.*, p. 44).

II. The Court of Appeals Found Abuse of Discretion

Not only did the Court of Appeals find abuse of discretion by the District Court in deciding the case; it specifically corrected errors by the District Court in questions of law and fact. By specifically correcting numerous District Court errors, the Court of Appeals *a fortiori* determined "abuse of discretion" by the District Court. By determining that the District Court committed error, the Court of Appeals *a fortiori* determined the District Court's findings and decision were not within the realm of its discretion.

1. The District Court incorrectly found that the *Williams* case was "clearly distinguishable." (App. B, p. 21a, fn. 61); the Court of Appeals found that *Williams* "most closely resembles" the present case. (App. A, p. 3a). (*Williams* v. *Green Bay & W. R. Co.*, 326 U.S. 549 (1946).

2. The District Court incorrectly found that the test for dismissal for *forum non conveniens* was ". . . evaluation of all factors related to the interests and conveniences of the parties and witnesses . . ." (App. B, p. 21a), wrongly relying on the less strict test of 28 U.S.C., Section 1404(a); the Court of Appeals found the test to be whether "vexation, harassment or oppressiveness" is caused Central (App. A, p. 4a), following this Court's decision in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, at 508 (1947).

The District Court never recognized that a more strict test was required for outright dismissal than was required for transfer (see App. B, pp. 21a, 22a); the Court of Appeals corrected the District Court, stating: "Dismissal requires a stronger showing of inconvenience than a transfer under Section 1404(a)." (App. A, p. 4a, fn. 2). In making this error, the District Court may perhaps have relied on the erroneous representations of petitioners that the tests for dismissal and transfer were the same. (JA 39).

3. The District Court incorrectly decided the controlling facts were the extent of Central's mileage in Georgia, and other physical aspects of the railroad (see, for example, App. B, pp. 15a-16a); the Court of Appeals found: "Much more important is the fact that financial control of Central is centered in this jurisdiction"; and that: "The operation of the railroad in other respects is not importantly involved." (App. A, p. 3a).

4. The District Court incorrectly found that Central's ". . . contacts with the District of Columbia are minimal." (App. B, p. 16a). As has been stated, the Court of Appeals found dispositive the financial control of Central

which is centered in Southern here in D.C. (App. A, p. 3a), and it found numerous, important contacts by Central with D.C. (App. A, p. 4a).

5. The District Court incorrectly found that plaintiffs "have not identified any witness within the District, and aside from the plaintiffs themselves, and the one director and possibly the handful of employees here, no prospect of any other is seen."—and that ". . . plaintiffs have pointed to no documentary evidence within the District . . ." (App. B, pp. 17a-18a);

The Court of Appeals correctly found that this "handful of employees" in D.C., which included the Chairman of Central's Board of Directors who is also President of Southern which controls Central; and Central's Comptroller who is also Comptroller of Southern, outweighed the possible outstate witnesses (App. A, p. 4a). Further, the Court of Appeals found that ". . . Central's Chief Executive Officer, its Comptroller, its Treasurer, and two of its Vice Presidents, are present in this jurisdiction, and detailed reports of the financial condition of Central are on file here with the Interstate Commerce Commission." (App. A, p. 3a).

6. The District Court incorrectly found that the *Koster* case was controlling (App. B, p. 22a); the Court of Appeals correctly distinguished the *Koster* case and pointed out that, unlike the situation in *Koster*, ". . . plaintiffs have substantial reasons for filing their suit in the District of Columbia." (App. A, p. 3a). *Koster* v. *Lumbermens Mutual Co.*, 330 U.S. 518 (1947).

7. Despite Southern's ownership of most of the stock of Central, the District Court incorrectly found as to Southern that ". . . there is nothing to suggest that it has in any way attempted to use its power to dictate or influence action by Central's directors." (App. B, p. 11a); the Court of Appeals correctly found that Southern was in control of Central. (App. A, pp. 3a-4a).

8. The District Court found that Central had 8 employees here, but it incorrectly failed to find that these 8 employees included 5 of Central's most important executive officers (App. B, p. 15a); the Court of Appeals correctly found that Central's Chief Executive Officer and Chairman of its Board of Directors, its Comptroller, its Treasurer, and two Vice Presidents, are present here. (App. A, pp. 3a-4a).

9. The District Court incorrectly found that the case "will compel detailed inquiry into various aspects of Central's internal affairs." (App. B, p. 17a); the Court of Appeals found that the case " . . . concerns the financial management of Central under its charter"; and that: "The operation of the railroad in other respects is not importantly involved." (App. A, p. 3a).

10. In sum, the Court of Appeals simply overruled as incorrect, the basic erroneous findings of the District Court that: (a) ". . . the bulk of the witnesses whose testimony must necessarily be heard are outside the District of Columbia . . ."; and (b) that: "Accessibility of sources of proof, another important factor, cannot be approached outside Georgia." (App. B, pp. 17a-18a).

The Court of Appeals corrected the District Court by finding that: ". . . control of Central by Southern outweighs the relevance, on the present issue, of the residence of a majority of the Directors, especially when Southern's headquarters and several of the officers directly concerned with the financial affairs of Central are present in this jurisdiction."; and by finding: "Though it is of some importance that twenty of the 21 directors are non-residents, 15 of them resident in Georgia, it does not appear that they would be needed as witnesses or, if any of them would be needed, how many and where they are." (App. A, p. 4a). In so finding, the Court of Appeals may well have relied on the fact that none of the resident Georgia directors own any shares of preferred stock whatsoever. (JA 109).

As shown, the Court went further than merely finding abuse of discretion by the District Court. The Court of Appeals found error after error of fact and law, and clearly corrected these errors.[3]

III. Forum Non Conveniens

As the Court of Appeals found: ". . . the District of Columbia was a reasonable and natural place for appellants to bring their action against Central . . ." (App. A, p. 4a).

1. Plaintiffs did not shop for a forum nor did they seek an inconvenient forum to harass defendants—plaintiffs sued in their home forum where they live and work.

2. Defendant Brosnan lives and works here.

3. Defendant Franklin lived nearby and worked here.

4. Defendant Central has a principal office here and does business here. Here is the headquarters of its Chairman of the Board of Directors and Chief Executive Officer; its Comptroller; its Treasurer; and two Vice Presidents. Stockholders owning more than 98.51% of Central preferred stock are here.[4] Financial control of Central is here, at the headquarters of Southern, and here is where are made the decisions not to pay Central preferred dividends. The books of account of Central are here, and here may be found all of the data needed to prepare Central's

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[3] Since no witnesses were heard by the District Court, and thus no question of credibility of testimony is involved, the Court of Appeals needed to give but little weight to the District Court's incorrect findings. *Perry* v. *Perry*, 88 U.S. App. D. C. 337, 190 F. 2d 601 (1951).

[4] Although Central admitted that Southern's ownership of Central preferred stock rose from 93% when suit began to 98.51% now, Central still used the old figure for the number of preferred stockholders. (Pet. Br., p. 5). Obviously the other minority preferred stockholders are now fewer in numbers and the record does not show who they are or how many are here.

voluminous 115 page Schedule A Annual Report to the ICC.[5]

5. Vital witnesses are here, including Central's high officers, and high officers of Southern. Voluminous information is here in the files of the ICC, since Central and Southern have been in many ICC proceedings here. In particular the ICC records on the two ICC proceedings for control of Central are here and nowhere else.

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[5] The Schedule A Annual Report to the ICC, of which this Court may take judicial notice since it is a statutorily required document, contains a truly enormous volume of information pertinent to the law suit. It contains over 115 pages of data, including dozens of schedules listing the Directors and principal general officers; the corporations controlling Central and those which Central controls; the largest stockholders of Central and its guaranties and suretyships; a general balance sheet and a detailed scheduling of many of the items in the balance sheet; the investments of Central, and its reserves; a full statement of the road and equipment property of Central and the depreciation taken on this equipment; a full statement of its equipment obligations; its obligations on income bonds and amounts payable to affiliated companies; federal income and other taxes accrued; a description of selected current liability accounts and other reserves; a statement of its depreciation reserve; its capital stock changes during the year; statements of capital surplus and retained income; and contingent assets and liabilities. There is a full statement of its income account for the year with a breakdown of its retained income—unappropriated account available to pay preferred dividends. Railway operating revenues are analyzed in great detail as are railway operating expenses. There is a complete study of the road property of Central and of its shop and power plant machinery. Separately operated properties are detailed. There is a statement of its rail line operations, including its switching and terminal traffic and cost statistics. There is a careful breakdown of the compensation paid by Central, both applicable to prior years and to this year's, and many other items.

All of this information, and more, is available here in D. C. through Central's Comptroller, whose headquarters are here. (JA 106-7).

Mr. F. A. Luckett, Central's Assistant Comptroller, is headquartered here (JA 108) and he filed with the ICC the detailed information on Employees' Services and Compensation (JA 108).

As the Court of Appeals noted, defendants failed to meet the test set out by this Court—namely—will suit here vex, harass or oppress the defendants? *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, at 508 (1947). Defendants' proof was of the sketchiest: three short affidavits; and unsubstantiated, incorrect arguments of counsel which the District Court erroneously accepted as fact.[6] No lists of witnesses were submitted nor did defendants list proposed testimony or detail what outstate documents were needed for their defense.

They failed even to meet the less stringent test of the proof needed for a transfer under 28 U.S.C. Section 1404(a).

The District Court used the wrong legal test, relying erroneously on defendants' argument that the two tests were the same. (JA 39). Further, the District Court erroneously found a factual basis of inconvenience of this forum.

The Court of Appeals corrected the District Court, finding the issue controlled by this Court's decision in *Williams* v. *Green Bay & W. R. Co.,* 326 U.S. 549 (1946), a case defendants neglected to cite to this Court, let alone distinguish.

Williams concerned the failure of a Wisconsin railroad to pay interest on debentures, and this Court stated it was similar to a suit to compel the declaration of dividends on stock. 326 U.S. at 557, fn. 10. The suit was brought in the United States District Court in New York, by New York residents, against a Wisconsin Corporation, a rail-

[6] Thus, the District Court accepted Central's counsel's unsubstantiated argument that "Central's recent reorganization" was a factor in non-declaration of dividends (JA 123). The reorganization was ended 18 years ago, in 1948. *Central of Georgia Ry. Co. Control,* 295 I.C.C. 563, 567 (1957); see, *Southern Ry. Co.—Control—Central of Georgia Ry. Co.,* 317 I.C.C. 557, 573 (1962). After 1948, Central paid preferred dividends for years, until Southern applied for control of Central in 1960. (JA 6).

road having all of its track, and most of its activities in Wisconsin. This Court reversed the lower court's holding that New York was *forum non conveniens* and held that the lower court improperly dismissed the case. This Court pointed out that although the doctrine of *forum non conveniens* was designed as an instrument of justice to prevent "vexatious" or "oppressive" suits (326 U.S., at 554) a suit to declare dividends, instituted in plaintiffs home forum, was not such a case.

This Court rejected objections to the jurisdiction based on the "internal affairs" argument, and pointed out (pp. 557-8):

> "If petitioners' theory of the case is right, the court need go no further than it would in enforcing any contract to pay money. If, as the majority of the court below thought, the payment of net income to the Class B debentures rested in the discretion of the directors, the question under the applicable local law would normally be whether their discretion had been abused. In case it were found to have been abused, the customary remedy is comparable to that which a court of equity affords in a suit for specific performance. The point is that, however this suit be viewed, the relief sought is not of such a character as to suggest that the federal court in New York would be so handicapped that it should remit the parties to Wisconsin. There is a suggestion that the parties should be remitted to Wisconsin because a construction of the covenant will primarily affect the interests of the public in that State where all of the respondent's railroad lines are located."

This Court rejected that argument, indicating that such considerations ". . . fall far short of those instances . . . where the federal court declines to act because its action might interfere with state proceedings, or state functions, or the functioning of state administrative agencies." (p. 558) This Court stated that it could not conclude that the maintenance of this suit in New York will be "vexatious or oppressive." (p. 559)

The Court of Appeals correctly applied the teachings of this Court in *Williams*, stating that the decisions rarely support invocation of the doctrine of *forum non conveniens*, and when they do, it is to prevent imposition on a defendant of undue vexation or oppressiveness. (App. A, p. 4a). The Court of Appeals was right when it decided that "... the District of Columbia was a reasonable and natural place for appellants to bring their action ..."; and that whatever "...vexation, harassment or oppressiveness is caused Central is not attributable to the choice of the forum." (App. A, p. 4a).

IV. The So-Called "Jurisdictional" Issue

Defendants argue that there is before this Court a "jurisdictional" issue (Pet. Br., p. 20-24) because a quorum of Central's directors was not served.

Defendants admitted the issue is not jurisdictional by arguing below that a quorum is needed here, only if there is another jurisdiction (Georgia) where service on a quorum may be had. By admitting that a quorum is not indispensable, they admitted correctly that the issue is not jurisdictional.

The issue is but another argument for *forum non conveniens*. Defendants unreasonably urge that minority stockholders must sue in Georgia, no matter how vexatious or oppressive it may be to them to do so. They urge this on formalistic grounds, not because Central is really controlled from there but despite the fact that it is not. Even the formalistic argument fails since Central's Board of Directors meets at will outside of Georgia (JA 21); and the minutes of the meetings of stockholders, Board of Directors and Executive Committee are now in New York with its Secretary (JA 18). The reality is that Central is controlled from here and here is where the suit should be tried.

The "quorum" argument is an obvious stalking horse for Central's desire to harass the minority stockholders. A "quorum" requires only 6 directors, and a majority vote of 4 is needed to declare dividends. (JA 20). Seven directors are employees of Southern or Central, and Central can bring a quorum to D. C. any time it wishes.

This nonjurisdictional issue was decided against defendants in District Court, and they failed to appeal. The Court of Appeals correctly ignored their belated contentions and so should this Court.

No conflict in circuits

Defendants rely on *Schuckman* v. *Rubenstein*, 164 F. 2d 952 (6th Cir. 1947), *cert. denied*, 333 U. S. 875 (1948) and argue that it conflicts with this Court of Appeals decision and that of the Third Circuit in *Kroese* v. *General Steel Castings Corp.*, 179 F. 2d 760 (3d Cir. 1950), *cert. denied*, 339 U. S. 983 (1950).

In *Kroese*, however, the Third Circuit recognized its result differed from that in *Schuckman*. Yet the Third Circuit expressly found no conflict of federal law with Schuckman, stating the issue turned not on federal law, but on Pennsylvania law which would refer to the law of Delaware where defendant corporation was chartered. Referring to *Schuckman*, *Kroese* stated:

> "While the Court in that case does not say anything about it, we take it that it must have been giving its views on Ohio law. Since we are declaring Pennsylvania law, as best we can, our conflicting decision brings nothing more than an expressed difference on the law of two states." 179 F. 2d, at 765.

Issue need not be decided here

Assuming, *arguendo*, there is a conflict in the Circuits, the issue is of little present national importance since the *Schuckman* decision has not been followed and seems abandoned, and rightly so.

As petitioners admit (Pet. Br., p. 23), *Schuckman* has not been followed by any subsequent decisions they cite, beginning with *Kroese, supra,* and including *Doherty* v. *Mutual Warehouse Co.,* 245 F. 2d 609 (5th Cir. 1957). The District Court so noted also, citing other cases in support of *Kroese* and showing the overwhelming criticism of *Schuckman* in the law reviews. (App. B, p. 10a). Petitioners had so little faith in this issue that they did not even appeal the decision against them.

Kroese decided the issue fairly, for the Third Circuit correctly pointed out that a quorum of directors is not necessary because ". . . when a court steps in and orders the payment of a dividend, the corporate affairs have reached the point where the judgment of the directors is no longer controlling." 179 F. 2d, at 763. Similarly, in *Williams* v. *Green Bay & W. R. Co.,* 326 U. S. 549, at 557 (1949), this Court found that in ordering payment of dividends, the court need go no further than in enforcing any contract to pay money.

As petitioners admit (Pet. Br., pp. 22, 23), to follow *Schuckman* would mean that minority stockholders may not be able to find any forum at all—a result rejected by *Kroese.* This unjust result has been rejected by the weight of authority, including this case, and there is no need for this Court to act.

V. The Court of Appeals Correctly Ended Defendants' Unreasonable Protracted Procedural Skirmishing

Defendants argue it is inconvenient to defend in D. C. only because they find it inconvenient to be called to account anywhere for their arbitrary actions. Georgia is less convenient for them than D. C.—they would have to transport their Chief Executive Officer, Comptroller, Treasurer and other officials to Georgia, together with the books of account located here. The high officials of South-

ern are also here and so are Southern's records as to Central.

The Court of Appeals correctly crushed Central's procedural roadblocks to trial on the merits. This Court, like the Court of Appeals, is well aware that errant corporations seek to harass stockholder actions and dodge trial on the merits. *Surowitz* v. *Hilton Hotels Corp.*, 383 U. S. 363 (1966), reh. denied, 384 U. S. 915. Like the defendant corporation in *Surowitz*, Central used procedural defenses to wear the stockholders down, to increase the cost of enforcing their rights and to escape giving an accounting of its stewardship.

This Court has pointed out the important role of minority stockholder suits in protecting stockholders against corporation insiders. The handicaps of minority stockholders are enormous, and Central should not be permitted to add to them by seeking further review of their unsubstantiated claims of inconvenience. This Court stated in *Surowitz*: "It has now been practically three years since the complaint was filed and as yet none of the defendants have even been compelled to admit or deny the wrongdoings charged. They should be." (383 U.S., at 374).

Respondents respectfully suggest the same situation obtains here. It is already 1½ years since the complaint was filed. Defendants have delayed that long in answering on the merits, despite the fact that suit in Georgia is no more convenient for Central than for the minority stockholders. The decisions not to pay Central preferred dividends are actually made here, in Southern's office building. Suit in Georgia would harass the plaintiffs and make their task many times harder and costlier—it would not reduce Central's inconvenience but add to it—but because of Central's (and Southern's) long purse, the tactical results would be to help them escape a just accounting.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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